UNITED
NATIONS

AT

Administrative Tribunal

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4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 676

Case No. 736: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 28 June 1993, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"... to

1. Order the Secretary-General to submit to it and to the Applicant the replies on which [the Under-Secretary-General for Administration and Management] based his conclusion that 'the replies received did not provide basis for continuing the investigation and that he decided, accordingly, to close the matter.'

2. Find that these replies do not, as claimed by [the Under-Secretary-General for Administration and Management] provide a basis for discontinuing the first so called 'investigation'.

3. Order the Secretary-General to submit to it and to the Applicant a copy of the ... report in case this panel carried out the investigation it was instructed to carry out and in case it did not, give the reasons [why] this panel disobeyed [the Under-Secretary-General for Administration and Management]'s instructions.

4. Find that the JAB [Joint Appeals Board] panel constituted to investigate the present case failed to deal with the issues this appeal raised.

5. Find that the Secretary-General, for reasons of political expediency, never wanted the investigation to take place.

6. Find that the Staff Rules and equity demand that the investigation requested by both the JAB and UNAT be carried out by a joint administrative/staff body to ensure that due process and the staff member's rights be respected.

and, consequently, to

1. ... set up a joint staff/administrative body to seriously investigate the contentions made by the Applicant and several other staff members, as stated in Judgement No. 538;

2. ... award the Applicant two years net salary because of the foot-dragging and bad faith displayed by the Administration since August 1990, which already led to the loss of his second appeal before this Tribunal."

Whereas the Respondent filed his answer on 8 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, on a probationary appointment at the P-2 level, as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent one. On 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and, on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

In 1988, the Applicant applied, under the Vacancy Management System then in force, for the D-1 post of Chief, International Security and Regional Affairs Section, PSCA. He was short-listed together with five other candidates. Their names were transmitted by the Appointment and Promotion Board to the Department for final selection. On 3 April 1989, the Applicant was notified that he had not been selected for the post.

On 20 April 1989, the Applicant requested the Secretary-General to review the administrative decision not to select him for the post. On 27 February 1990, he lodged an appeal with the Joint Appeals Board (JAB). He claimed that the Vacancy Management System conflicted with the Staff Regulations and Rules and that the D-1 post for which he had applied had been earmarked for the successful candidate before the recruitment process had begun. In support of this contention, the Applicant submitted an affidavit, dated 23 August 1990, signed by nine staff members stating that the successful candidate for the post had been pre-selected.

In its report, adopted on 24 August 1990, the JAB recommended, inter alia, that an investigation be undertaken of the Applicant's claim that the post had been earmarked in advance for a particular candidate. In transmitting the JAB report to the Applicant, on 6 September 1990, the Under-Secretary-General for Administration and Management informed the Applicant of the Secretary-General's decision to take no further action on his appeal.

The Applicant filed an application with the Tribunal on 18 October 1990. The Tribunal rendered its Judgement No. 538, on 1 November 1991, upholding the Vacancy Management System but concurring with the JAB's concern regarding the claim set forth in the affidavit, dated 23 August 1990, as well as with the assertion that signatories thereto had subsequently been threatened. The Tribunal noted the absence of any inquiry by the Administration, endorsed the JAB's recommendation and expressed its trust that the

Administration would "conduct a full investigation with respect to this matter, including the alleged threat of retaliatory action." (Cf. Judgement No. 538, paragraph VI). In a letter dated 14 November 1991, the Applicant drew the Secretary-General's attention to this part of the Tribunal's judgement and asked that the investigation referred to be conducted as soon as possible.

In a letter dated 12 December 1991, to the Applicant and to the signatories of the affidavit of 23 August 1990, the Director, Office of the Under-Secretary-General for Administration and Management, asked what was the basis for the statement made in the affidavit that the post had been earmarked for a particular staff member. He inquired whether any retaliatory threats had been made in relation to the signing of the affidavit.

In a letter to the Director, Office of the Under-Secretary-General for Administration and Management, dated 1 January 1992, the Applicant challenged the approach of the Administration to the investigation, because the JAB, in its report, had called for a "special investigating body" to be established. The Applicant suggested that such a body should have staff participation. In his reply, dated 4 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, stated that "the conduct and modalities of an administrative investigation" were "within the discretion of the Secretary-General."

In a letter dated 19 February 1992, to the Director, Office of the Under-Secretary-General for Administration and Management, the Applicant accused the Administration of delaying the investigation to allow time for the Under-Secretary-General for Political and Security Council Affairs to leave the Organization and avoid being questioned on the matter. The Applicant urged that an appropriate investigative body be set up as soon as possible.

On 28 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that the replies he had received to the letter of inquiry

he sent to the signatories of the affidavit "do not provide a basis for continuing the investigation." He had decided, therefore, "to close the matter." On 25 March 1992, the Applicant requested the Secretary-General to review the decision not to carry out the investigation requested by the JAB and the Tribunal. On 25 May 1992, having received no reply, the Applicant lodged an appeal with the JAB.

In an undated letter, received by the Applicant in November 1992, the Principal Officer, Office of the Under-Secretary-General for Administration and Management, confirmed that the Secretary-General had decided, in the context of the pending JAB appeal, to "re-open the investigation into certain allegations made in a document dated 23 August 1990." She noted that a panel composed of two staff members had been appointed in June 1992 and that their investigation had been delayed due to their absences from the office, but said that they would "resume their work shortly."

In his letter dated 9 November 1990, to the Under-Secretary-General for Administration and Management, the Applicant expressed his objection to the composition of the panel and to the way it was conducting its investigation. He added that he would therefore "refuse to cooperate with this two person panel" and would "not accept its conclusions."

In a letter dated 23 November 1992, the Under-Secretary-General for Administration and Management stated that the Secretary-General "has full discretion as to the manner in which investigations are conducted on his behalf," and urged the Applicant "to reconsider [his] decision not to cooperate with the panel which has been appointed." He noted that he was in any event "instructing the panel to proceed with its investigation forthwith."

On 2 March 1993, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "22. The Panel noted that the Appellant's main objection was to the composition of the Investigation Panel, ...

23. The Panel felt that since the Secretary-General had carried out an investigation as expected by the Tribunal, the issue in question was the interpretation of the Tribunal's concept, if any, of how the investigatory body should be composed. As the judgement was silent on that point, the Panel decided that no one could interpret the Tribunal's decision but the Tribunal itself.

24. The Panel regretted that such a long time had elapsed before the Secretary-General had appointed an investigation panel and that he had done so only after the Appellant had requested an administrative review of his failure to do so.

25. The Panel recommends that the appeal be rejected."

On 5 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your appeal in the light of the Board's report and he accepted the Board's recommendation. No further action will be taken on your appeal.

With regard to the observations in paragraph 24 of the Board's report, the Secretary-General wishes to recall that circumstances beyond the control of the panel members delayed the investigation. Progress in the investigation was further hampered because of your unwillingness to cooperate with the Panel."

On 28 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB did not carry out its task, and instead of dealing with the issues raised by the case, referred them to the Tribunal.

2. The Administration did not want a full and fair investigation to take place.

3. The Staff Rules and Regulations and equity demand that the investigation be carried out by a joint body including staff representation.

Whereas the Respondent's principal contention is:

The Secretary-General may investigate allegations of improper conduct without submission of such matters to joint bodies. The Applicant must cooperate with such investigation and bears the risk of his non-cooperation.

The Tribunal, having deliberated from 20 October to 4 November 1994, now pronounces the following judgement:

I. The Joint Appeals Board (JAB) considered the Applicant's appeal against the decision not to promote him to the D-1 post of Chief, International Security and Regional Affairs. After the JAB had completed its consideration of the case, the Applicant submitted an affidavit dated 23 August 1990, signed by a number of staff members, who asserted that the contested post had been earmarked "a priori" for a particular candidate. The JAB took note of the affidavit and "in view of the seriousness of the charge and the fact that it [was] not competent to conduct inquiries which might involve disciplinary sanctions" transmitted the affidavit to the Secretary-General "with the recommendation that he establishes a special investigating body".

II. At the time, the Secretary-General did not follow this recommendation. As a consequence, the Applicant appealed to the Tribunal. In its Judgement No. 538, the Tribunal included a paragraph in which it noted "with dismay the apparent absence, on the part of the Administration, of any inquiry of the staff members

involved with respect to either the perception or the alleged threat described by them to determine and evaluate their basis, ...". In addition, the Tribunal trusted that "the Respondent [would] (a) act on the recommendation made by the Joint Appeals Board ..., (b) conduct a full investigation with respect to this matter" and finally concluded that "the inadequate action with respect to the concerns expressed by the Joint Appeals Board regarding the document dated 23 August 1990, in itself, constituted unfair treatment of the Applicant" and called for compensation.

III. Pursuant to Judgement No. 538, the Director of the Office of the Under-Secretary-General for Administration and Management, on 12 December 1991, sent letters to the staff members whose signatures appeared in the affidavit, inquiring as to "(a) the basis on which you made the statement contained in the above-mentioned affidavit; and, (b) whether you received any threat in relation to the signing of the affidavit; if so, when, by whom, and in what terms." This was the only step taken to comply with the JAB's recommendation and the Tribunal's request. The Acting Under-Secretary-General for Administration and Management informed the Applicant on 28 February 1992, that "the replies received to the letter sent to the signatories of the affidavit dated 23 August 1990 do not provide a basis for continuing the investigation and [that he had] decided, ..., to close the matter."

IV. The Applicant challenged this decision, alleging that no serious investigation in the sense requested by the JAB and the Tribunal had taken place. While the JAB was considering the case, the Respondent, on 5 August 1992, informed the JAB that the "new Under-Secretary-General for Administration and Management had decided that a full-fledged investigation of the allegations made by [the Applicant] would be conducted ..." He added that "an

investigation panel has been appointed." In view of these circumstances, the Respondent argued that "the appeal involved in [the Applicant's] case ... is now without any object."

This letter, which was treated as the Respondent's reply to the Applicant's statement of appeal, was transmitted to the Applicant on 2 October 1992. He made no comments on the Respondent's submission that the case was moot. The JAB was equally silent on this issue. The Tribunal, in this respect, shares the Respondent's view and considers that the proceedings should have ended at this stage.

V. Nevertheless, this did not occur. As set forth below, the following new developments ensued having the same effect as a new recourse procedure. The Applicant, upon being informed that the Administration had set up a new investigation panel, challenged this decision on 9 November 1992, on the ground that he should have been notified in time of the appointment of the new panel and consulted about its composition. He also claimed that the panel should have been constituted pursuant to administrative instruction ST/AI/371. He objected to the secretive way in which the panel conducted its work. The Applicant also informed the Administration that he would not cooperate with the new panel.

In his reply dated 23 November 1992, the Under-Secretary-General for Administration and Management stated that "the Secretary-General has full discretion as to the manner in which investigations are conducted on his behalf. He may appoint anyone he deems to be qualified to conduct the investigation provided that, as is the case here, the appointed officials have been selected with a view to ensuring fairness and impartiality. It is the Secretary-General's responsibility to ensure that facts are properly ascertained, and in discharging that responsibility, there is no need to consult any individual staff member or the staff representative bodies."

The JAB took note of the Applicant's objections and was of the view that "the issue in question was the interpretation of the Tribunal's concept, if any, of how the investigating body should be composed" and, that, therefore "no one could interpret the Tribunal's decision but the Tribunal itself."

The JAB recommended that the appeal be rejected. The Tribunal considers that the JAB's recommendation refers both to the appeal lodged by the Applicant against the decision to close the original investigation and to the appeal against the establishment of the new investigation panel. The Secretary-General accepted the JAB's recommendation and the Applicant appealed before the Tribunal.

VI. The Tribunal, having examined the different pleas submitted by the Applicant, finds:

(a) With respect to the pleas in which the Applicant challenges the decision taken by the Administration to close the first investigation, the Tribunal is of the view that, inasmuch as a new investigation was ordered, the challenged decision is irrelevant and the issue is to be considered moot.

(b) In connection with the plea that the Applicant should be provided with a copy of the report produced by the second investigation panel, the Tribunal trusts that the Applicant would have been provided with a copy of the report once the investigation had been completed. Nevertheless, in view of the Applicant's decision not to cooperate, the Tribunal recalls its Judgement No. 560, Claxton (1993), paragraph VIII in which it held that "the staff member making the allegations must, of course, participate, without obstructing, in such investigations or possibly be subject to loss of the right to remedial action." Cf. also Judgement No. 659, Al-Atraqchi (1994), paragraph V.

(c) As regards the plea asserting that the JAB "failed to deal with the issues this appeal raised", the Tribunal is unable to share the Applicant's views. As shown in its report, the JAB duly

considered the different points raised by the Applicant and concluded that the appeal should be rejected on the ground that it was exclusively up to the Tribunal to decide whether the investigation panel set up by the Administration complied with the request in Judgement No. 538.

The JAB's report shows that, when it reached its conclusions, it was fully cognizant of the objections raised by the Applicant to the decision to establish the new investigation panel.

The Tribunal therefore finds no merit in the Applicant's plea in this respect.

(d) As to the assertion that the "Secretary-General, for reasons of political expediency, never wanted the investigation to take place", the Tribunal holds that the fact that a second investigation was decided upon after the first one was closed is sufficient to show that there were efforts on the part of the Administration to act on the Applicant's recourse. Had the Applicant cooperated and permitted the investigation to be completed, he could have appealed against any administrative decision based on it.

(e) In his last plea, the Applicant requests the Tribunal to find that "the Staff Rules and equity demand that the investigation requested by both the JAB and UNAT be carried out by a joint administrative/staff body." The Tribunal holds that the Administration has not contravened any existing rule or regulation in establishing the investigation panel which is being challenged.

VII. The Applicant claims that the procedure to be followed should be the one set forth in administrative instruction ST/AI/371.

The Tribunal observes that there has been no departure from such a procedure and that the steps taken in connection with the Applicant's recourse complied with the provisions of Chapter II of administrative instruction ST/AI/371. Those provisions do not contemplate, in the preliminary phase of fact finding, the setting up of a joint staff/administrative body, as requested by the Applicant.

Furthermore, the Administration, in its letter dated 23 November 1992, clearly stated that it intended to adhere to ST/AI/371.

VIII. The Tribunal therefore finds that the investigation called for in Judgement No. 538 was duly established by the Administration, and that, in view of the Applicant's refusal to participate, no further action with respect to the matter need be taken by the Respondent.

For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 4 November 1994

B. Maria VICIEN-MILBURN
Executive Secretary

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Administrative Tribunal

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AT/DEC/677
9 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 677

Case No. 744: DAURE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 23 July 1993, Bernard Dauré, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To hold that 'the fullest regard' was not given by the Respondent to the Applicant's qualifications in filling a D-1 vacancy at the Information Products Division announced as 90-1-DPI-069-NY (29 April 1991);

(b) To determine that the contractual rights of the Applicant under Article 101, paragraph 3 of the United Nations Charter, article IV of the Staff Regulations, in particular regulations 4.2 and 4.4 and staff rules 104.14(a)(ii) and 112.6 have been violated; and

(c) To order the Respondent to rescind his decision to fill the post in question through a lateral move, ..., to fix the appropriate amount of compensation payable to the Applicant for the injury sustained by him should the Secretrary-General decide in the interest of the United Nations that the Applicant be compensated without further action being taken in his case."

Whereas the Respondent filed his answer on 11 May 1994;

Whereas the Applicant filed written observations on 8 June 1994;

Whereas the Applicant submitted further written observations on 29 September 1994;

Whereas the Tribunal put questions to the Respondent on 19 October 1994, to which he replied on 26 October 1994;

Whereas further documentation was submitted to the Tribunal, directly by the Office of Human Resources Management, on 28 October 1994;

Whereas the Applicant submitted further observations on 31 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 19 November 1967, as a Translator in the French Section, Translation Service, Office of Conference Services, at the P-3 level. His probationary appointment was converted to a permanent one on 1 November 1969. With effect from 16 February 1971, the Applicant was assigned, as an Editor, to the Editorial and Official Records Service, Official Records Editing Section. On 1 May 1974, he was transferred to the Department of Economic and Social Affairs, Office of Technical Cooperation, Support Services Branch, Reports Section. His title was changed to Technical Editor, with effect from 1 May 1975. He was promoted to the P-4 level, with effect from 1 September 1977, and on 1 April 1978, he was transferred to the Department of Technical Cooperation for Development. His functional title was changed to Chief, Reports Unit, Programme Support Division, with effect from 1 July 1983. On 1 April 1986, he was promoted to the P-5 level.

On 26 April 1991, in response to a Vacancy Announcement, the Applicant applied for the D-1 level post of Chief of Publications Service, Information Products Division, Department of Public Information (DPI). In a letter dated 8 May 1991, the Senior Recruitment and Placement Officer acknowledged receipt of the Applicant's application for the vacancy.

According to the record, 13 internal and 22 external candidates applied for the post. The Secretary-General approved the recruitment of an external candidate who, however, declined the appointment. Shortly thereafter, on 6 February 1992, the Secretary-General announced the suspension of all external recruitment for posts in the Professional category. In a memorandum dated 2 March 1992, to all Directors and Chiefs of Service in DPI, the Under-Secretary-General for Public Information announced the implementation of several staff changes within DPI, including the lateral transfer of the Deputy Director, Dissemination Division, to the post of Chief, Publications Service, Information Products Division.

In a memorandum dated 8 May 1992, the Applicant requested from the Senior Recruitment and Placement Officer "to be told in writing what happened to my application." In a reply dated 13 May 1992, the Senior Recruitment and Placement Officer informed the Applicant that the post for which he had applied had been filled through a lateral transfer.

In a letter dated 21 May 1992, the Applicant requested the Secretary-General to review the administrative decision not to select him for the post for which he had applied. Not having received a substantive reply, the Applicant, on 30 July 1992, lodged an appeal with the Joint Appeals Board (JAB). He claimed that "the qualifications of the staff member who was selected are less appropriate to the post than mine" and suggested that "extraneous considerations" influenced the selection of a candidate. On 22 September 1992, the Applicant filed a supplementary statement of appeal.

The JAB adopted its report on 23 April 1993. Its considerations, conclusions and recommendations read, in part, as follows:

"...

29. The Panel also noted that para. 6 of administrative instruction ST/AI/373 on placement and promotion, dated

23 December 1991, states that 'Heads of Departments and Offices may reassign staff within their Departments or offices to vacant posts at the same level.' Accordingly, the Panel found that in assigning a staff member at the D-1 level to fill the post in question, the Administration had acted within its authority, that such assignment did not require approval by the Appointment and Promotion Board, nor was there any need for the Administration to take other staff members' candidatures into consideration.

Conclusions and recommendations

30. The Panel concluded that the decision not to select the Appellant for the post in question was not improperly taken and, therefore, found no violation of the terms of his appointment.

31. The Panel took note, however, of the Appellant's uncontroverted contention that his performance had not been evaluated since 31 December 1984 - in violation of ST/AI/240/Rev.2. The Panel considers this situation unacceptable and recommends that the Appellant's performance be evaluated without further delay.

32. Accordingly, the Panel makes no further recommendation in support of this appeal."

On 27 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and agreed with its conclusion that the decision not to select you for the post in question did not violate the terms of your appointment. No action on your appeal will, therefore, be taken.

The Secretary-General noted the Board's concern in regard to irregularities in the evaluation of your performance and directed that it should be carried out immediately."

On 23 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given full and fair consideration when he applied for the post at issue because there had been no performance evaluation report since December 1984.

2. The burden of proof is on the Respondent to show that the Applicant was duly considered for the post. The Respondent has not provided this proof.

3. The Secretary-General's discretionary decision not to promote the Applicant was tainted by lack of due process.

Whereas the Respondent's principal contention is:

The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-selection for the post in question.

The Tribunal, having deliberated from 19 October to 9 November 1994, now pronounces the following judgement:

I. The Applicant claims that he was not duly considered for the D-1 post of Chief of Publications Service, Information Products Division, DPI, for which he had applied, in accordance with the Vacancy Management System (VMS) then in force. As a result of the selection process, an external candidate was selected but declined the appointment. Because of the recruitment freeze in force at the time, the post was then filled through the lateral transfer of another staff member. The Applicant also claims that he was not informed of the negative outcome of his application for the post until he inquired about it and that this reply came when the decision to fill the post through a lateral transfer had already been taken.

II. The Applicant claims that, as a consequence of flaws in the original selection process, the decision to fill the post through a

lateral transfer should be rescinded and compensation granted to him. The Applicant considers it "irrelevant" that the post was eventually filled through the lateral transfer of another staff member. In his written observations, he clearly states that "the fact that the external candidate declined the offer and that an internal candidate was later assigned to the post does not absolve the Respondent from having violated due process and the Applicant's contractual rights in the first instance when the post was considered by the APB [Appointment and Promotion Board]."

III. The Tribunal is unable to agree with the Applicant's contention. As the Tribunal has previously held, under the VMS (which is no longer in effect) the Respondent was entitled to fill a vacancy through a lateral transfer rather than promotion. See also administrative instruction ST/AI/273, paragraph 6. A staff member who is seeking promotion and hence was not eligible to be considered for a lateral transfer, as was the case of the Applicant here, lacks standing to challenge a lateral transfer. (Cf. Judgements No. 661, Al Atraqchi (1994) and No. 657, Araim (1994)). The Tribunal therefore need not consider the issues raised by the Applicant concerning the outcome of the original selection process.

IV. The Tribunal nevertheless requested the Respondent to provide "... minutes, correspondence, notes or other records of the APB establishing that the Applicant was considered [for promotion]". In response, the Respondent submitted the Office of Human Resources Management's evaluation of the candidates and that of the APB. Although the documentation provided shows that the Applicant was considered, it also shows that he was not afforded the opportunity to comment, as required by administrative instruction ST/AI/338/Add.5, and that he was not informed of his non-inclusion in the short list that should have been established by the APB. Moreover the Applicant was not informed of the outcome of the selection process until after the candidate selected had declined the appointment and the recruitment freeze had led to the decision

to fill the post by a lateral transfer. These are procedural shortcomings that should have been avoided. In addition, the APB, in carrying out its advisory functions, should ensure that its recommendations are based on its own independent evaluation rather than on mere acquiescence in the wishes of a department, as may have been the case here. Finally, the Tribunal notes the points raised by the Applicant concerning the lack of a recent report on his performance. While this appears to have had no adverse effect in the circumstances of this case, it is, of course, the responsibility of the Administration, in the first instance, to prepare a performance evaluation report on a timely basis. If it fails to do so, a staff member, instead of remaining silent for a lengthy period, may make the delinquency known promptly and request corrective action.

V. The circumstances set forth above rendered any procedural shortcomings in the selection process academic. Consequently, the application fails.

VI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 9 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 678

Case No. 715: LUKAS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero; Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 1 March 1993, Ellen Lukas, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia, to:

> "... implement Administrative Tribunal Judgement No. 544 (Lukas) of 8 November 1991 ..."
>
> and
>
> "... [find that] the Secretary-General has failed to exercise ... his authority as the Chief Administrative Officer of the Organization (Charter, Article 97) and ... to use all means available to him ..., in order to secure due respect for his decision of 13 March 1990 (...) and for Administrative Tribunal Judgement No. 544 (Lukas);
>
> ..."
>
> and
>
> "... to order that the Secretary-General pay the Applicant an amount equivalent to two (2) years of her current salary as compensation for the serious professional and personal injury and hardship suffered by the Applicant ...

> ... to order the Secretary-General to secure apologies from the authors of the memorandum of 23 September 1992 (...) for their injurious and false statements concerning the Applicant's professional qualifications and experience.
>
> ... to order that the implementation of the Applicant's promotion to P-4 be backdated to the time of the Secretary-General 's decision, ..."

Whereas the Respondent filed his answer on 1 June 1994;

Whereas on 13 July 1994, the Applicant submitted written observations;

Whereas, on 19 October 1994, the Tribunal put questions to the Respondent, to which he provided answers on 1 November 1994;

Whereas, on 24 October 1994, the Applicant submitted further written observations;

Whereas, on 4 November 1994, the Applicant submitted additional observations;

Whereas the facts in the case are as follows:

The Applicant served the United Nations from 1969 to 1972, as an Information Officer and again from 15 November 1976, under a fixed-term appointment at the P-3 level which was extended from time to time and converted to a probationary appointment on 15 April 1979. On 1 February 1980, she was granted a permanent appointment in the Department of Public Information (DPI).

As a result of the restructuring of DPI in 1987 and 1988, a number of organizational units were to be replaced by new ones and their posts and resources allocated accordingly.

On 8 April 1988, the Applicant was advised that, under the new staffing table, she would be placed immediately as Information Officer in the Communications Services Section of the Communications and Project Management Service. However, she could apply for other posts to be advertised. The Applicant applied for a P-4 post in the Human Rights and Development Programmes Section of the Communications and Project Management Service. She was short-listed for the post by the ad hoc Departmental Selection Committee, along

with two other candidates. None of them was selected. On 5 May 1989, the post was advertised, the section to which the post belonged having been renamed "Economic and Social Development and Human Rights Programmes Section". The Applicant again applied for the post but was not selected.

On 2 May 1989, the Applicant requested the Secretary-General to review the administrative decision to re-advertise the post for which she had been short-listed, as the decision not only violated the rules agreed on between the Department and the staff, but would have a direct negative impact on her terms of employment within the United Nations. In a reply dated 19 May 1989, the Assistant Secretary-General for Human Resources Management (OHRM) informed the Applicant that the Secretary-General had decided to maintain the decision to re-advertise the post in order to seek additional candidates with experience in developing countries.

On 23 May 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision not to select her for promotion to a P-4 position of Human Rights Information Officer in DPI. The JAB adopted its report on 28 February 1990. It concluded and recommended as follows:

> "55. The Panel concludes that although the selection process had certain shortcomings and reflected poor judgement on the part of management, the appellant has failed to sustain the burden of proving that the contested decision was motivated by extraneous factors, e.g., discrimination against the appellant because of her nationality, or personal prejudice.
>
> 56. The Panel concludes also that the contested decision did not, per se, constitute a violation of the Staff Rules, nor did it substantively violate the internal selection procedures of DPI.
>
> 57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the appellant therefrom, and in view also of the appellant's competence and experience, that DPI make substantial efforts, promptly, to locate a suitable P-4 post for the appellant."

On 13 March 1990, the Officer-in-Charge of the Department of Administration and Management transmitted a copy of the JAB report to the Applicant and informed her, in part, as follows:

> "The Secretary-General has ... decided to maintain the contested decision. The Secretary-General has further decided, to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case, and to take no further action on the matter."

On 11 June 1990, the Applicant filed an application with the Tribunal contending, inter alia, that the Under-Secretary-General for DPI had consistently denied her fair consideration for all vacancies for which she had applied despite the recommendation of the JAB and the Secretary-General's decision of 13 March 1990.

On 8 November 1991, the Administrative Tribunal rendered its Judgement No. 544, Lukas, in which it said, inter alia:

> "VI. It is therefore the Tribunal's opinion that new efforts should be made in good faith to fulfil the Secretary-General's commitment and that, while the Applicant is not entitled to single out or to choose the post to be assigned to her, nevertheless the renewed efforts should take into consideration all the conditions mentioned by the Secretary-General when ordering that efforts should be made to have the Applicant placed in a 'suitable P-4 post for which you are qualified and interested'. It appears from information received from the Respondent by the Tribunal that promotion of the Applicant to the P-4 level has taken place. However, this should not affect the renewed efforts referred to in this paragraph.
>
> ...
>
> IX. For the injury suffered by the Applicant as a consequence of her unfair treatment in connection with the Secretary-General's decision conveyed to her on 13 March 1990, the Tribunal orders the Respondent to pay to the Applicant one year of net base salary at level P-4, step VIII."

On 30 October 1991, the Tribunal was advised that, with effect from 26 August 1991, the Applicant had been promoted to the

P-4 level, but the Applicant did not formally accept the post to which she had been assigned concomitant therewith. In a memorandum dated 23 December 1991, she agreed to fulfil its duties of Chief Editor, only on a temporary basis, "until a P-4 which fulfils the Secretary-General's commitment to me of 13 March 1990 is available". She added, inter alia, that:

> "[T]his does not change my legal position that this post does not fulfil the requirements of the Secretary-General's decision and the Tribunal Judgement No. 544, and I will continue actively to seek full implementation of the Secretary-General's commitment and the Tribunal Judgement."

On 10 January 1992, the Assistant Secretary-General, OHRM, advised the Applicant, inter alia, as follows:

> "In view of the fact that the Department of Public Information (DPI) did not find that you were qualified for the vacant P-4 posts for which you subsequently applied, it was decided to promote you to the P-4 level outside the normal procedures of Vacancy Management, and to assign you some of the functions discharged by [another staff member] at the time. The decision you are now challenging simply implements the administrative and budgetary aspects of your promotion. The Administration is fully aware of the terms of Judgement No. 544, and sees the decision communicated to you on 3 December 1991 as a partial fulfilment of the commitment given to you on 13 March 1990.
>
> It is my understanding that, upon the departure of [another staff member] on 31 December 1991, you were assigned the full functions of his P-4 post, pending the occurrence of a vacant P-4 post for which you would be qualified, and in which you would be interested. The fact that you have been promoted to the P-4 level will greatly facilitate any change in attribution of functions since a lateral transfer is all that will be required for that purpose.
>
> Let me assure you that the complete resolution of your case is a high priority for all concerned. ..."

In a reply dated 6 February 1992, the Applicant contested the statement that she was not qualified for the posts for which she had applied.

On 20 May 1992, the Applicant applied for the P-4 level post of Human Rights Information Officer, DPI, (Post No. UNA-27773-E-P4-002) (DPI/ESDHR/Human Rights Officer) that was soon to become vacant. In a letter addressed to the Under-Secretary-General for Public Information, the Applicant enclosed her resumé and briefly stated the reasons she considered herself qualified for the position.

On 2 July 1992, the Assistant Secretary-General, OHRM, wrote to the Under-Secretary-General, DPI, with respect to the 1992 Promotion Review. He noted that the Applicant was among those staff members entitled to special consideration. He referred to the letter of the Secretary-General to Applicant, dated 13 March 1990, and Judgement No. 544, Lukas, dated 8 November 1991. He concluded by stating that a "full discharge of the commitment given by the Secretary-General to [the Applicant] requires that she be assigned to a post for which she is qualified and interested". He further stated that the Applicant should receive "priority consideration for any vacant P-4 posts in which she has expressed an interest, before such posts can be used for promoting other staff members."

According to the record, the Applicant was offered a number of posts, including: Project Manager for Social Development Information; Project Manager for the 1993 International Year for Indigenous People and for the 1994 International Year of the Family.

On 28 August 1992, the Applicant reiterated her application for the post of Human Rights Information Officer and declined the offer for the post of Project Manager for Social Development Information.

On 23 September 1992, the Director of the Communications and Project Management Division advised the Applicant, in a detailed communication, that in the Department's view, she was not qualified for the post of Project Manager for Human Rights in which she had expressed an interest in May 1992 and which had become vacant on 14 September 1992.

On 28 September 1992, the Applicant requested a review of this decision and also asked for the Secretary-General's agreement

to the direct submission of her appeal to the Administrative Tribunal.

Not having received a substantive reply to her request, on 18 November 1992, the Applicant lodged an appeal with the JAB, in which she also requested, under staff rule 111.2(f), a suspension of action to be taken to fill the Human Rights Information Officer post until her appeal on the merits had been considered by the JAB.

On 25 November 1992, the JAB adopted its report on the request for a suspension of action, and recommended as follows:

> "18. The Panel, having carefully examined the documents pertaining to the appeal and taking into consideration the statements made by both parties at the hearing, accepted the Appellant's request for suspension of action under staff rule 111.2(f).
>
> ...
>
> 20. The Panel noted that, in her appeal, the Appellant had made a prima facie case which merited full consideration.
>
> 21. The Panel further observed that, if the request for suspension of action on the contested decision were denied, the Appellant would be left without an effective remedy, should her appeal result in a recommendation in her favour.
>
> 22. Accordingly, the Panel unanimously recommends that all action to fill the post in question, or any personnel action with respect to any recommendation to confirm the assignment of any staff member to that post or to assign its functions to anyone, be suspended, pending the completion of the appeal."

On 9 December 1992, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General ... has noted that the post to which you wish to be appointed is among those which cannot be filled until a decision is made as to whether it is decided either to keep the post where it was budgeted, or to redeploy it temporarily to another programme, or to freeze it for future use in a priority area. Therefore, no action can be taken at the moment in regard to the post. Under these circumstances, the Board's recommendation for suspension of action is not relevant at this stage. However, to accommodate the concerns of the Board, the Secretary-General

decided that, should the decision be taken to keep the post in the Department, it would be filled on only an interim basis until the final decision of the Secretary-General on the substance of your appeal."

On 15 January 1993, the JAB adopted its report on the merits of the case and recommended as follows:

"30. The Panel considered that what the Administration has done so far in this case has been done solely in order to comply pro forma with what it was obliged to do and even this was not done in an appropriate manner. Furthermore, if the Administration had acted appropriately, this appeal would not have had to be submitted. In light of the above, the Panel recommends that the Administration make stronger efforts to identify a post of [sic] which the Appellant is suitable and in which she is interested.

31. At the same time the Panel unanimously recommends that, pending the placement of the Appellant in such a post, the P-4 post of Human Rights Information Officer, DPI, should not be filled by another candidate - neither through lateral transfer nor otherwise.

32. Bearing in mind that the Appellant is due to retire in September 1993, the Panel unanimously urges the Secretary-General to take the recommended action without further delay."

On 21 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her, inter alia, as follows:

"The Secretary-General ... agrees with the Board that you do not have a right to any particular post. However, given that priority consideration for any post can come into play only among candidates who are equally qualified and in view of the fact that the Department established that there were other candidates who were better qualified for the post than you, he is unable to share the Board's opinion that the selection process for the P-4 post of Human Rights Information Officer was not conducted in an appropriate manner. Accordingly, he must reject the Board's recommendation that the subject post should not be filled until you have been placed in a post for which you are interested.

Based on the record, the Secretary-General is also unable to share the Board's opinion that the efforts made so far by the Administration to locate a post for which you are qualified and in which you are interested were only pro forma. Nevertheless, the Administration shall continue its efforts to identify a post for which you are qualified and in which you are interested."

On 1 March 1993, the Applicant filed with the Tribunal the application referred to above.

The Applicant separated from service on 30 September 1993.

Whereas the Applicant's principal contentions are:

1. The Secretary-General breached the Applicant's terms of appointment, in failing to fulfil his commitment, as expressed in his letter of 13 March 1990, to give her full and fair consideration, on a priority basis, for a vacant and suitable P-4 post for which she was qualified and interested.

2. The Respondent failed to implement Judgement No. 544, Lukas.

Whereas the Respondent's principal contentions are:

1. The Respondent fully complied with his obligation to the Applicant by identifying and offering to her a number of posts in accordance with Tribunal Judgement No. 544, Lukas.

2. The Applicant has failed to establish her allegations of bad faith and/or prejudice in the Respondent's implementation of Judgement No. 544.

3. The Applicant is not entitled to any further compensation.

The Tribunal, having deliberated from 19 October to 9 November 1994, now pronounces the following judgement:

I. On 13 March 1990, the Applicant was informed that, in accordance with the Joint Appeals Board (JAB) recommendation, "the

Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested." The Applicant claimed that the Secretary-General had not fulfilled this pledge. In 1990, she filed an appeal requesting the Tribunal to order the Secretary-General to do so.

II. While the case was before the Tribunal, the Applicant was recommended for promotion to the P-4 level. This recommendation was supported by the Office of Human Resources Management, as stated in a memorandum dated 11 October 1992, "as an exception to the Vacancy Management procedures, with a view to implementing the decision of the Secretary-General in her case."

III. On 8 November 1991, the Tribunal rendered its Judgement No. 544. The Tribunal held that the efforts made by the Respondent to date had only partially fulfilled the Secretary-General's commitment and that "new efforts should be made in good faith to fulfil the Secretary-General's commitment." On 3 December 1991, the relevant P-5 Personnel Action form was completed and the Applicant's promotion to the P-4 level was implemented, with effect from 26 August 1991. This decision was considered by the Administration in a memorandum dated 10 January 1992, as only "a partial fulfilment of the commitment given ..."

The post against which the Applicant was placed was that of Chief Editor in the Communication Services Section. The Applicant claimed that the post did not "fulfil the requirements of the Secretary-General's decision and the Tribunal's Judgement No. 544". Nevertheless, she accepted it on 23 December 1991, albeit "on a temporary basis until a P-4 [post] which fulfils the Secretary-General's commitment ... of 13 March 1990 is available."

IV. On 20 May 1992, the Applicant wrote to the Under-Secretary-General for Public Information, expressing her interest in the post of Human Rights Information Officer. In her letter, she pointed out

that she could be assigned to that post by a lateral transfer. This post was to become vacant following its incumbent's request for a transfer on account of the excessive workload involved. This fact was not unknown to the Applicant. In view of the circumstances, the Chief, Economic and Social Development and Human Rights Programmes Section, Communications and Project Management Division (CPMD), DPI, suggested, on 22 July 1992, in a memorandum to the Director, CPMD, that "the workload on human rights be divided between two people: one person to handle the World Conference on Human Rights and the International Year for Indigenous People and the other to handle the on-going regular human rights programme." She added that "if it is your decision to agree to [the Applicant's] request to become the Project Manager for Human Rights, then it is my understanding that she would transfer to this Section, with her post, to undertake the project management functions associated with the on-going human rights programme."

V. The Applicant denies that this suggestion was followed by a formal offer made to her. Nevertheless, the Applicant was aware of the initiative and of the possibility of it leading to an offer. In her submission before the JAB, the Applicant says that "the next step the Director and the Section Chief took was to prepare to divide the human rights job into two P-4 posts so that one person (not me) would have the responsibilities of the World Conference and another person (me) would handle human rights publications. I discussed this manoeuvre with the DPI Acting Executive Officer on August 17 and also with several colleagues who came to me informally to find cut how I would react to this arrangement." It is, therefore, clear that the Applicant was aware of the Administration's intentions and that her reaction towards them was negative. It is equally clear that the Administration was also aware of her negative attitude.

VI. According to the Applicant, on 21 August 1992, she was informed that her request for a lateral transfer to the Human Rights

Information Officer post had been rejected. The Director CPMD/DPI on 23 September 1992, informed her that her request had been refused on the grounds of her insufficient qualifications. The letter elaborates extensively on this issue. Instead, she was offered a choice between two posts; Information Officer for Social Development or Information Officer for the Year of the Indigenous Peoples and the 1994 Year of the Family.

VII. The Applicant turned down these offers saying that they were not P-4 posts and therefore did not fulfil the Secretary-General's commitment. In her letter to the Under-Secretary-General for Public Information dated 28 August 1992, after refusing the offers made to her, the Applicant added that she would "continue to press for a lateral transfer to the Human Rights Information Officer job." On 28 September 1992, the Applicant requested the Secretary-General to reverse the decision refusing her the Human Rights Information Officer post.

VIII. On 18 November 1992, the Applicant lodged an appeal with the JAB. The JAB adopted a report favourable to the Applicant. The Secretary-General did not accept the JAB's recommendations. The Applicant then appealed to the Tribunal and requested that it find that the Secretary-General had "failed to perform his commitments" and "failed to implement Administrative Tribunal Judgement No. 544, Lukas".

IX. In the light of the foregoing sequence of events the Tribunal finds:

(a) That a number of offers were made to the Applicant in order to provide her with a suitable P-4 post.

(b) That these offers appear to have been made in good faith, though the Applicant did not consider the posts to be at an adequate level of responsibility.

(c) That the suggestion of dividing the functions of the Human Rights Information Officer post sought by the Applicant was not motivated by an intent to give the Applicant only the least important functions involved.

(d) That the suggestion to divide the post was prompted by its excessive workload, a circumstance that had led its previous incumbent to request a transfer.

(e) That, even if a formal offer was not made, the Applicant was sounded out as to whether she would accept the new P-4 post which would have included part of the duties of the P-4 post she sought.

(f) That the Applicant reacted negatively to such a possibility.

(g) That, in fact, the whole recourse procedure initiated by the Applicant is directed solely against the decision not to grant her a lateral transfer to the P-4 Human Rights Information Officer post. In her submission to the Secretary-General dated 28 September 1992, the Applicant requested review of the decision refusing her that post and in her pleas before the JAB she asked to be "placed against the Human Rights job for which I applied."

(h) That the Applicant's attitude in this respect is not in keeping with Judgement No. 544, Lukas, paragraph VI, in which the Tribunal held that the Applicant was "not entitled to single out or to choose the post to be assigned to her."

(i) That the Secretary-General's commitment referred to a post for which the Applicant would be duly qualified.

(j) That the Applicant's qualifications were appraised freely by the Administration as provided by the relevant Rules and Regulations and that the refusal to accept her request for the post she sought was not based on prejudice or other extraneous factors.

X. For the foregoing reasons, the Tribunal decides:

1. That the Secretary-General has not acted contrary to his commitment by refusing the Applicant's request for a transfer to the Human Rights Information Officer post.

2. That the Administration has made reasonable efforts to honour the Secretary-General's commitment.

XI. The Applicant also asks the Tribunal to order the Director CPMD/DPI to offer apologies for statements contained in his letter to the Applicant dated 23 September 1992. The Tribunal declines to do so since the Applicant cannot assert a claim of defamation of her reputation on account of an internal letter of this nature directed to her.

The Applicant also requests that her promotion to the P-4 level be given an earlier implementation date that would enable her to obtain an improvement in her pension. This point was not part of the Applicant's original recourse and was not submitted to the JAB. The Tribunal therefore cannot entertain it.

XII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 9 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/679
9 November 1994

ORIGINAL: ENGLISH
FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 679

Case No. 682: FAGAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 15 July 1992, Susan Fagan, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application requesting the Tribunal, inter alia:

"...

to order the Respondent ... not to take any action to terminate the Applicant's permanent contract pending the outcome of the Tribunal's decision on her application;

8. ...

(b) to ... rule that ... the Applicant was entitled to return to her previous post as a result of the serious and cumulative irregularities that occurred in respect of the decision to remove her from her post;

(c) to ... rule further that UNICEF's procedures for the upgrading of posts including the treatment of incumbents, as well as their practices with respect to double incumbency of posts and their attempt to terminate the permanent contract of the Applicant violated the acquired rights of the Applicant...;

(d) to order the Respondent to abide by his decision that no action be taken to terminate the contract of the

Applicant for the purpose of allowing UNICEF to give her the benefit of staff rule 109.1(c)...;

(e) to award the Applicant appropiate compensation ... for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's action or lack thereof;

(f) to fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two year's net base pay;

(g) to award the Applicant, as costs, the sum of $4,000.00."

Whereas the Respondent filed his answer on 27 November 1992;

Whereas the Applicant filed written observations on 28 January 1993;

Whereas the Tribunal heard the parties at a public hearing held on 18 October 1993;

Whereas, in November 1993, the Tribunal decided to adjourn consideration of the case until its 1994 Spring session;

Whereas, on 12 July 1994, the Tribunal put questions to the Respondent to which he provided answers on 13 and 14 July 1994;

Whereas, in September 1994, the Tribunal decided to adjourn consideration of the case until its 1994 Autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 12 May 1966, as a File Clerk/Typist at the G-2 level. After serving on a succession of fixed-term appointments and, with effect from 12 November 1966, on a probationary appointment, she was granted a permanent appointment on 1 May 1968. During the course of her employment with UNICEF, the Applicant was promoted to the G-3 level, with effect from 1 February 1967, to the G-4 level, with effect from 1 July 1974 and to the G-5 level, with effect from 1 January 1980, with the functional title of Registry Assistant. On 10 July 1987, the Applicant was transferred to the post of Basic Assistant List (BAL) Control Clerk. On 13 January 1992, she was

assigned to the Office of the Director of the Programme Division. On 11 February 1993, the Applicant's permanent appointment was terminated and she separated from UNICEF.

Performance Evaluation Reports

The Applicant's performance as BAL Control Programme Assistant from 14 July 1988 to 31 December 1989 and from July to December 1990, was evaluated in two performance evaluation reports (hereinafter referred to as "the first report" and "the second report") which the Applicant signed "under protest" on 20 September 1991.

In February 1990, the Applicant completed her section of the "first report". In March 1990, her supervisor completed his sections and forwarded the report to the Applicant for signature. In his comments on her performance, her supervisor stated that because of her Staff Union activities, the Applicant spent "a lot of time away from the post" and that her answering phone calls from staff who sought her advice "had often resulted in interruption of the task at hand." On 4 April and 18 May 1990, the Applicant's supervisor asked her to sign the report, but she did not do so.

After an exchange of correspondence with her supervisor, on 27 July 1990 the Applicant initiated a rebuttal to the report in a memorandum to the Director, Programme Division. On 12 October 1990, the Applicant's second reporting officer signed the report. On 30 April 1991, she informed the Personnel Officer, through the Director, Programme Division, that the Applicant refused to sign her report.

On 18 July 1991, the Applicant wrote to the Personnel Officer, advising that she intended to avail herself of the services of an Ombudsperson. On 20 September 1991, the Applicant signed her first report stating: "I disagree with and protest the entire PER [Performance Evaluation Report] because the ratings given do not accurately reflect the quality or quantity of work, but were intended to penalize me for staff representational activities and to force me to give them up. ... I am signing

under protest. The matter has already been brought to the attention of an Ombudsperson."

During June and July 1991, the Applicant's supervisor and second reporting officer completed their parts of the Applicant's second report.

The Applicant discussed this report with the Director, Programme Division, her second reporting officer. On 13 August 1991, she wrote to him, expressing her disagreement with the low ratings she had been given and stating that she was being "set up to be thrown out of the Section and ultimately out of the Organization, as when in early 1990, my supervisors tried to oust me from the Section by preventing me from performing my job." She also alleged that comments concerning her staff representational activities were "not legitimate". On 21 October 1991, the Applicant's supervisor submitted her comments on this communication as part of the rebuttal process. The Applicant submitted further comments on 29 November 1991.

On 20 September 1991, the Applicant signed the second report "under protest", stating that she disagreed with specific ratings "because the PER is being used as a tool to punish me for my staff representational activities."

On 25 January 1992, the Ombudsperson submitted her report on the "second report" and recommended as follows:

> "17. ... [The] Ombudsperson reached the conclusion that the supervisor's assessment was flawed. It is recommended that ratings for professional competence be changed from 2 to 4; and quantity and quality of Work be changed from 3 to 4. The staff member was able to complete assignments with accuracy and met the objectives required despite the difficult circumstances she encountered in her specific work situation.
>
> 18. ... that the ratings for work relationships be changed from 3 to 5 and for communications skills to be changed from 4 to 5. It should be noted that staff member maintained an excellent relationship with all co-workers."

On 30 January 1992, the Ombudsperson submitted her report on the "first report" and recommended:

> "That due consideration be given to the fact that the staff member in her previous post received PER's that showed that her performance was good.
>
> That the supervisors and the staff member hold discussions to establish a reasonable cap on hours spent on staff activities."

On 7 February 1992, the Deputy Executive Director of UNICEF appraised the Ombudsperson's comments on the first and second reports, stating, inter alia:

> (A) First Report
>
> "...
>
> ... [that] a total of one year and three months elapsed from the date of 20 October 1990, when [the Applicant] was given her PER and 30 January 1992, when you submitted your report as her Ombudsperson. We maintain that her deliberately delaying completion of her PER is not only a violation of the PER process but also renders her use of the ombudsperson system as time-barred.
>
> Therefore, as far as the Organization is concerned, [the Applicant's] 1989 PER is complete. She did indeed issue a statement on 27 July 1990, following completion of the PER by the First Reporting Officer, protesting the 1989 PER and this statement formed an integral part of the PER record."
>
> (B) Second Report
>
> "... It was not until we read your Ombudsperson's report, Part A, that we learned that [the Applicant] contacted you in August 1991, in connection with her 1990 PER. ...
>
> ... it is clear from her statement dated 20 September 1991, ... that while she signed under protest ... she made no mention of any intent to avail herself of the services of an Ombudsperson.
>
> ...

> The only logical explanation in this regard is that [the Applicant] did not intend to avail herself of our grievance procedure, but rather clearly opted only to make reference to her memo of 13 August 1991 to [the Director, Programme Division] registering her disagreements with the PER. In accordance with our established procedures in handling disagreements on completed PERs, this statement rendered her completion of the 1990 PER as final.
>
> Therefore, as we consider [the Applicant's] 1990 PER to be complete, we do not consider it appropriate to comment on the substantive issues you are now raising in your Ombudsperson report, Part A. ...
>
> ..."

Classification of Post

In September 1990, the Programme Division requested the reclassification of the Applicant's post from the G-5 to the G-6 level. The Job Classification Panel approved the upgrading, with effect from 1 January 1992, with the title of the post as "Programme Budget Assistant". The Applicant contends that: "She was never notified of the upgrading nor given the report to participate in the submission of the new job description as required by UNICEF policy."

On 1 August 1991, the Division of Personnel issued a Vacancy Announcement of the G-6 level post of Programme Budget Assistant, which was encumbered by the Applicant. The announcement was in accordance with the guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 and CF/AI/352/Amend.4/Add.1. Five staff members applied for the post, including the Applicant.

According to the record, a Selection Advisory Panel (SAP) reviewed the qualifications of all candidates and recommended to the Appointment and Promotion Committee (APC) a staff member other than the Applicant for the post. On 12 November 1991, the APC endorsed the recommendation by the SAP. The Minutes of the APC meeting read, in part, as follows:

"...

[The Applicant], the Committee noted, was placed in the subject post in 1987, when her then post of Registry Clerk was abolished. It was reported that she has been given extensive on-the-job training, but that her performance nevertheless, has on balance, not been fully satisfactory as indicated in her Performance Reports since joining the Section.

The Committee conducted a thorough and lengthy review of the case, bearing in mind the fact that the post was encumbered, and, taking all factors into account, concluded that [the other staff member] was clearly the best qualified candidate. Accordingly, the Committee endorsed the Selection Advisory Panel's recommendation for [the other staff member's] appointment to the subject post, with promotion to the upgraded G-6 level, effective 1 January 1992."

In a letter dated 22 November 1991, the Director of the Division of Personnel informed the Applicant that she had not been selected for the post she encumbered and that she would be given "every reasonable consideration for priority placement in another suitable vacant post." He concluded: "In our placement efforts, we will take into account your overall performance, qualifications and contractual status as per AI 1986-10 on 'Personnel Policies and Procedures applicable to incumbents of posts which are to be abolished'. In the event that we are unable to place you in a suitable post, your permanent appointment will be terminated as of 31 May 1992, with the appropriate termination indemnity."

On 20 December 1991, the Applicant requested a review of the administrative decision not to appoint her to the post of Programme Budget Assistant.

On 8 January 1992, the Director of the Division of Personnel wrote to the Applicant, informing her that she would "be attached to the Director's Office, Programme Division, with effect from 13 January 1992, through 31 May 1992." He also reiterated his advice that she apply for other posts for which she might be qualified.

On 9 January 1992, the Applicant asked the Secretary of the Joint Appeals Board (JAB) to arrange, under staff rule 111.2(a), for the designation by the Presiding Officer of the JAB of "a Chairperson or member of the appropriate JAB, ... with a view to reaching a conciliatory conclusion of the matter." She also requested a suspension of action on the decision to remove her from her post. Conciliation proceedings took place but it was not possible to reach agreement.

On 24 January 1992, the Deputy Executive Director informed the Applicant, on behalf of the Secretary-General, that the administrative decision not to select her for the post she encumbered had been "undertaken fairly and properly..." and would be maintained.

On 10 February 1992, the Applicant lodged an appeal with the JAB and, at the same time, requested, under staff rule 111.2(f), suspension of action of the contested decision and the "related action underway to remove me from my job." In its report adopted on 28 February 1992, the JAB recommended that "any action to remove [the Applicant] from her post be suspended until the [JAB] submits its recommendation on the substance of the appeal..." On 27 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that the Secretary-General could not accept this recommendation as the administrative decision she was contesting had already been implemented.

The JAB adopted its report on the merits of the case on 9 April 1992. Its conclusions and recommendations read, in part, as follows:

> "38. ... the Panel concluded that the procedures laid down by UNICEF's appointment and promotion bodies to fill the upgraded post in question were followed. However, the Panel felt that the [Applicant's] PERs submitted to the appointment and promotion bodies, were tainted by extraneous factors, which affected the full review of [the Applicant's] candidature by her peers.
>
> ...

40. The Panel recommends that UNICEF find, without further delay, a suitable post for the [Applicant], where she will be able to utilize her skills and the long-time experience gained in the Organization. No action should be taken to terminate the [Applicant]'s permanent appointment.

41. Bearing in mind that staff representational activities are part of staff members' official duties necessary for staff management consultations the Panel recommends that the [Applicant] and her supervisors reach a better understanding as to the fulfilment of the [Applicant]'s duties as a staff representative, which would enable the [Applicant] to carry out her duties in the office together with her responsibilities as a staff representative, under the provisions of staff rule 108.1.

42. Having concluded that the [Applicant] was unfairly treated in connection with her consideration for the upgraded post, and that she was improperly threatened with termination of her permanent appointment, the Panel recommends that the [Applicant] be paid the equivalent of three months' net base salary, and makes no further recommendations in support of the appeal."

On 21 May 1992, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General:

"... has examined your case in the light of the Board's report. He agrees with the Board's finding that there was no evidence of any ill-intention on the part of UNICEF towards you in the filling of the upgraded post. He cannot, however, share the Board's reservations about the fairness of the selection process. ... The Secretary-General finds no impropriety in UNICEF's decision to proceed with the selection without waiting for the Ombudsperson's report on your 1989 PER as most of the delay was due to your initial refusal to complete your 1989 performance evaluation report. Such action cannot bring the UNICEF selection process to a halt. Moreover, the selection process cannot be vitiated by the fact that it took place without consideration of the Ombudsperson's report on the 1990 PER since UNICEF was not on notice that such a report was forthcoming. The Secretary-General has also noted that the promotion bodies had received copies of your rebuttal statements prior to the consideration of your case. Your right to full and fair consideration was therefore respected.

As regards UNICEF's policy that an upgraded post is regarded as a new post and that the former post at the lower level is considered abolished, the Secretary-General finds that this policy is consistent with staff regulation 2.1. He further finds that UNICEF instruction CF/AI/352/ Amend.4/ Add.1 does not conflict with staff rule 109.1(c) but provides guidance for reviewing cases of locally recruited staff encumbering upgraded posts. Its procedures must be followed, but a staff member whose post has been upgraded is also entitled to the application of the provisions of staff rule 109.1(c) prior to any action being taken towards separation from service.

The Secretary-General has noted that you had been given a reasonable amount of official time off to carry out your representational responsibilities. He is satisfied that your supervisors provided you with every reasonable support to carry out those responsibilities, as well as your responsibilities in respect to your duties in the office.

On the basis of the above considerations, the Secretary-General has decided

(a) to reject the recommendation that you be paid three months' net base salary;

(b) to accept the recommendation that no action should be taken to terminate your appointment, for the purpose of allowing UNICEF to give you the benefit of staff rule 109.1(c), insofar as it applies to locally recruited staff;

(c) to request UNICEF to include a copy of the Board's report in your Official Status file;

(d) to take no action with respect to your representational activities.

..."

According to the record, on 26 May 1992, the Applicant's candidacy for two secretarial posts was reviewed in a meeting of the APC. The APC concluded that the Applicant did not meet the minimum requirements for these posts. At the same meeting, the APC reviewed the Applicant for eight posts encumbered by staff members holding fixed-term appointments. According to the Respondent, "the APC was made aware of the Applicant's situation (abolition of her post, her permanent appointment, her JAB appeal and the

applicability of staff rule 109.1(c))". The APC did not recommend the Applicant for any post.

On 28 May 1992, the Deputy Executive Director (Operations) informed the Applicant as follows:

> "...
>
> As decided by the Secretary-General, UNICEF will continue its placement efforts on your behalf, subject to the availability of suitable posts in which your services can be effectively utilized, to give you the benefit of staff rule 109.1(c), insofar as it applies to locally recruited staff. Thus, the notice period of six months given to you on 22 November, is hereby extended through 31 August 1992. In the event we are unsuccessful in placing you in a suitable post by that date, your permanent appointment will be terminated, with appropriate termination indemnity.
>
> ..."

In a letter dated 10 June 1992, the Applicant asked the Under-Secretary-General for Administration and Management whether the letter of 28 May 1992, from the Deputy Executive Director, was consistent with the Secretary-General's decision of 21 May 1992, that "no action would be taken to terminate [the Applicant's] appointment for the purpose of allowing UNICEF to give the benefit of staff rule 109.1(c)". In a reply dated 23 June 1992, the Under-Secretary-General for Administration and Management stated that there was "no contradiction" between the two letters: "the purpose of the extension of the six-month notice period previously given to [the Applicant] by UNICEF is to allow for [her] rights under staff rule 109.1(c) to be fully respected."

On 17 June 1992, the Applicant requested the Secretary-General to review the administrative decision contained in the letter of 28 May 1992, from the Deputy Executive Director (Operations), alleging that the decision was "contrary to the unanimous recommendation made by the JAB on my case ... adopted as a decision of the Secretary-General as conveyed to me in the letter of the Officer-in-Charge dated 21 May 1992". She added: "The

decision of the Secretary-General is quite clear in that there are no time limits imposed to find an appropriate post for me." In a reply dated 15 July 1992, the Deputy Executive Director (Operations) referred the Applicant to the letter of 23 June 1992, from the Under-Secretary-General for Administration and Management and informed her that the decision would be maintained.

On 15 July 1992, the Applicant filed with the Tribunal the application referred to earlier.

On 17 July 1992, the Applicant lodged an appeal with the JAB asking the JAB to recommend to the Secretary-General that "UNICEF suspend action on the termination of my permanent appointment by 31 August 1992, pending its in-depth consideration of the substance of UNICEF's administrative decision..."

On 3 August 1992, the Ad Hoc Deputy Co-ordinator of the Panel on Discrimination and Other Grievances (Panel on Discrimination) submitted a report to the Executive Director and to the Secretary-General on the complaint filed by the Applicant with the Panel that her PERs for 1989 and 1990 had been incorrectly drawn up and that, as a result, she had not been selected to fill the post which she had held for four years, when it was reclassified to the G-6 level.

In a reply dated 31 August 1992, the Deputy Executive Director (Operations) informed the Panel on Discrimination that the Executive Director had acted on the complaints by the Applicant in the light of the JAB report and that he did not propose to take any further action thereon.

The JAB adopted its report on the suspension of action on 14 August 1992. Its conclusion and recommendation read as follows:

"Conclusion and recommendation

13. The Panel concluded that by shifting the burden for finding a post from the Organization to the [Applicant], and by setting the deadline, the possibility that a suitable post would become available was diminished. UNICEF has thereby ignored the Secretary-General's directive and, therefore, placed an

additional burden on the [Applicant] during an already stressful time.

14. Therefore, the Panel recommends that all action to separate the [staff member] from service be suspended pending the decision on the substance of this appeal, and that during such time, and if necessary, thereafter, the Secretary-General's directive to find her a suitable post be implemented."

On 25 August 1992, the Assistant-Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has taken note of the Board's report and decided to approve the recommendation of the Panel that all action to separate you from service be suspended pending the decision on the substance of your appeal. He requests that the Panel expedite consideration of your appeal and submit its report by 15 October 1992."

The JAB adopted its report on the merits of the case on 13 October 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

21. ... The Panel ... recommends that UNICEF extend the Appellant's service for a final three-month period from the date of the Secretary-General's decision on this report and expend every effort on a priority basis to resolve the issue with the Appelant. Towards that end the Panel also recommends that the Appellant herself aggressively pursue placement opportunities during that time."

On 12 November 1992, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General ... concurs with the Board's recommendation that your service should be extended for a final three-month period from today during which every effort should be made both by UNICEF and yourself to resolve the placement issue. At the end of this three-month period, in the event no suitable post has been found, you will be separated from service with appropriate termination indemnity.

> The Secretary-General has also noted that UNICEF has already expended consistent efforts in pursuing the issue, including a review by its Appointment and Promotion Committee of your suitability against 19 posts, including vacant (both current and projected) and fixed-term G-level posts."

On 19 November 1992, the Deputy Executive Director (Operations) wrote to the Applicant as follows:

> "In line with the decision of the Secretary-General [of 12 November 1992], your service will be extended for a final three-month period from 12 November 1992 through c.o.b. [close of business] 11 February 1993. During this time period, you will continue to be attached to the Director's Office, Programme Division, and every effort will be made by UNICEF to resolve the placement issue.
>
> We also note the Secretary-General's statement that every effort should also be made by you in this regard.
>
> As per the decision of the Secretary-General, at the end of this three-month period, in the event no suitable post has been found, you will be separated from service with appropriate termination indemnity."

In a letter dated 8 February 1993, the Applicant requested the Secretary-General to review this administrative decision. On the same date, she lodged an appeal with the JAB, requesting a suspension of action on the contested decision. The JAB adopted its report on 16 February 1993. Its considerations and recommendations read, in part, as follows:

> "Considerations and recommendations
>
> ...
>
> 21. The Panel was not in a position to judge the efforts made by UNICEF to resolve the [Applicant]'s placement problem. On the other hand the Panel felt that in reviewing the suitability of the [Applicant] for other possible posts, UNICEF has not given the [Applicant] any preference over other staff members who had other types of appointment, as required by staff rule 109.1(c)(i).
>
> 22. The Panel found that it had no competence to re-open issues previously dealt with by the JAB, issues which had

been the subject of a final decision by the Secretary-General.

23. Accordingly, the Panel decided to recommend that the [Applicant]'s request for suspension of action be denied."

On 17 February 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your request in the light of the Board's report. While he has reservations in regard to the Panel's observation on the treatment of your candidature by UNICEF in its attempt to resolve your placement problem, he has decided, in accordance with the Board's recommendation, not to accept your request for suspension of action."

The Applicant had separated from the service of UNICEF on 11 February 1993. After her separation from service, the Applicant was paid four months of her termination indemnity. From 16 June 1993 to date, the Applicant has been employed by the United Nations on a series of fixed-term appointments of one month at the G-4 level.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance evaluation reports were tainted by prejudice so as to provide an improper basis for the decision not to appoint the Applicant to her former post, after it had been reclassified.

2. The Applicant's rights were violated by the Executive Director's decision of 28 May 1992, to limit to a three month period the search for alternative posts mandated by staff rule 109.1(c), thereby threatening her with termination of her permanent appointment earlier than envisaged in the Secretary-General's decision.

3. The Applicant's rights were violated by the Respondent's decision to take no action on certain recommendations of the JAB.

Whereas the Respondent's principal contentions are:

1. Selection of another staff member for the post in question was a valid exercise of administrative discretion. The Applicant's lengthy delays in instituting grievance procedures do not give her a right to suspension of the selection process.

2. No credible evidence exists indicating that the evaluation of the Applicant, as recorded in her performance evaluation reports, was tainted by prejudice or other improper motive.

3. UNICEF did not violate the Applicant's rights in the procedure of reclassification of the Applicant's post.

4. Staff do not have a right to expect the Secretary-General to accept the recommendations of joint bodies, even if unanimous.

5. The decision of the Secretary-General has been properly implemented and takes account of the rights of staff whose posts have been abolished to benefit from the procedures set out in staff rule 109.1(c).

6. Staff are entitled to a reasonable period of time for staff representational activities. The Applicant has provided no evidence that she was unreasonably denied release from her duties for such activities.

The Tribunal, having deliberated from 20 October to 16 November 1993 in New York, from 28 June to 21 July 1994 in Geneva and from 14 October to 9 November 1994 in New York, now pronounces the following judgement:

I. The Applicant, a former staff member of UNICEF, encumbered a post at the G-5 level. This post was reclassified to the G-6 level, with effect from 1 January 1992. As a consequence, and in accordance with the policy followed by UNICEF, the post at the G-6 level was considered a new post and advertised as a vacancy. The Applicant applied for this post, but was unsuccessful. She was informed, on 22 November 1991, that another candidate had been

selected and that her permanent appointment would be terminated if no suitable post could be found for her.

II. The Applicant alleged that the decision not to appoint her to the new post was based on incomplete information "since my last two performance evaluation reports are still unresolved". The Administration decided to maintain its decision and the Applicant lodged an appeal before the JAB. She requested a stay of the decision and reiterated the arguments set forth when requesting administrative review.

III. The JAB found that "the Appellant's PERs [performance evaluations reports] submitted to the Appointment and Promotion bodies, were tainted by extraneous factors, which affected the full review of Appellant's candidature" and that she had been "improperly threatened with termination". The JAB recommended an indemnity of three months salary.

It also recommended that UNICEF "find, without further delay, a suitable post for the Appellant" and that "no action be taken to terminate the Appellant's permanent appointment." As the JAB viewed the Applicant's PERs, which were submitted to the APB, as tainted by extraneous factors connected with the Applicant's: Staff Union activities, it also recommended that "the Applicant and her supervisors reach a better understanding as to the fulfillment of the Applicant's duties as a staff representative."

IV. The Secretary-General, in his decision of 21 May 1992, did not completely follow the recommendation of the JAB. While the JAB recommended "that UNICEF find, without further delay, a suitable post for the Appellant", the Secretary-General said that "no action should be taken to terminate your appointment, for the purpose of allowing UNICEF to give you the benefit of staff rule 109.1(c)." The Tribunal notes that staff rule 109.1(c) does not preclude the possibility of a termination.

V. The Applicant was not satisfied with the Secretary-General's decision and appealed to the Tribunal, submitting several pleas, including a request "to rescind the decision of the Secretary-General insofar as it rejects the unanimous recommendation of the JAB that UNICEF find without further delay a suitable post for the Applicant." In this respect, the Tribunal finds that the Respondent must give full effect to article 109.1(c) of the Staff Rules which states, in part, that "subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent or regular appointments shall be retained in preference to those on all other types of appointments."

VI. The Tribunal notes that the Applicant in her pleas before the Tribunal challenges the procedure of UNICEF in reclassifying posts, and the treatment of incumbents of those posts, as a violation of her acquired rights. She also requests the Tribunal "to find that the Applicant was entitled to return to her previous post." While this challenge raises an important issue, as the Tribunal finds in favour of the Applicant on other grounds, there is no need to address it. Moreover, although there is discussion of the UNICEF reclassification procedure on the record, the Tribunal has some question as to whether the issue was properly raised in the initial stages of the proceedings before the JAB.

VII. The Tribunal finds no merit in the Applicant's claim that she has a right to be appointed to the new G-6 post. According to its jurisprudence, staff members have no right to be appointed to any given post; they are only entitled to be duly considered for it. Nevertheless, the Tribunal is of the view that the conditions in which the Applicant's candidacy was considered are open to criticism. The post was filled without awaiting the results of the rebuttal procedures connected with the Applicant's performance evaluation reports. While it must be acknowledged that those procedures were unduly prolonged by the Applicant's initial refusal

to sign the reports concerned, it appears that, in the last analysis, the failure of her candidacy was attributable to the unfavourable evaluation and ratings given in those reports.

According to the Applicant, her performance evaluation reports for the periods 14 July 1988-December 1989 and July-December 1990 (which is when she was called upon to engage in union and staff representational activities concurrently with her office duties) were drafted with the deliberate intention of discouraging her from continuing her union and representational activities or, at the least, of inducing UNICEF to adopt a more clearly defined policy regarding the rights and obligations of staff representatives and the choice of union bodies authorized to defend the interests of UNICEF staff.

The Tribunal has taken the two disputed reports into consideration. It notes that they bring out the difficulty of the tasks entrusted to the Applicant, for which she was not well-prepared. The first of these reports mentions her praiseworthy efforts to cope with her professional obligations. It says that: "It is well recognized that the staff member has made tremendous efforts to learn and accomplish the tasks mentioned in 2.1." (The reference is to computer work). Mention is also made, however, of inadequacies deriving from the extra work involved in union and representational activities. These inadequacies are reflected more in the ratings than in their accompanying comments.

The Tribunal has equally taken note of the opinions of the Ombudsperson enlisted by the Applicant. In one report, dated 30 January 1992, this authority recommended that the Applicant and her supervisors should hold discussions so as to define the "reasonable time" that she could devote to her union and representational activities. In a second report, dated 25 January 1992, the Ombudsperson found that the performance evaluation report for the period July-December 1990, was flawed and recommended that the Applicant's ratings should be revised. In addition, the Joint Appeals Board, which was seized of the Applicant's complaint, took the view that the two performance

evaluation reports were tainted by extraneous factors. (Cf. paragraph 38 of the Joint Appeals Board's report of 9 April 1992).

These convergent opinions, which are highly favourable to the Applicant's case, deserve consideration. However, the Tribunal is of the opinion that the supervisors' discriminatory intentions have not been proven. On the other hand, it appears that a regrettable situation was created with respect to the evaluation of the Applicant's performance, as a result of a lack of definition of her obligations, particularly the uncertainty regarding the time that she should devote to her professional and representational activities, respectively. In the Tribunal's view, it is this vagueness that led to the seeming inconsistencies in the wording of the Applicant's performance evaluation reports. As recommended by the Ombudsperson, adjustments were required to enable the Applicant to cope simultaneously with her office duties and her personnel representation activities without being overburdened. An arrangement should have been made to resolve this matter, in accordance with the directive laid down in administrative instruction ST/AI/293. The failure of the UNICEF Administration in this regard is culpable.

VIII. In the opinion of the Tribunal, great significance should be attached to the last sentence of paragraph 11 of administrative instruction ST/AI/293. It is important for arrangements to be made in each case in order to determine the facilities or assistance which staff representatives should receive and the time which should be allotted to their staff representational activities, on the one hand, and their office duties, on the other. These arrangements may be either formal or informal, but it is important that they should be concluded in advance. In other words, when a staff member is called upon to engage in representational activities, all concerned should know where they stand, so as to avoid disputes.

It would seem that, in most cases, the application of these rules does not create any major difficulty. However, this was not

so in the present case, which comprises various contentious episodes raising questions concerning the Applicant's union and representational activities and their relationship with her office duties.

Thus, the uncertainty regarding the Applicant's obligations, deriving from the failure to conclude an arrangement as provided in administrative instruction ST/AI/293, was the primary source of the subsequent events that resulted in the rejection of her candidacy. Therefore, the Tribunal concludes that the selection process by which the G-6 post was filled was flawed.

IX. The Tribunal must now determine whether the decision of 28 May 1992, and the subsequent decisions which ultimately resulted in the termination of the Applicant's permanent appointment with UNICEF, by a decision of 12 November 1992, are valid or whether, on the contrary, these decisions should be annulled, either because of discrimination suffered by the Applicant by reason of her union and staff representational activities or on any other ground. The Tribunal will answer these questions based on the following relevant staff regulations and rules and administrative instructions.

X. Staff regulation 8.1(a) states: "The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies." Paragraph (b) of the same article provides: "Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in subparagraph 1(a) above." Lastly, staff rules 108.1 and 108.2, constituting chapter VIII of the Staff Rules, contain detailed provisions concerning "Staff representative bodies" and "Joint staff-management machinery". It follows from these texts that

union and staff representational activities are not only legitimate but that, as conceived by the Staff Regulations and Rules, they meet the concern to involve staff and management thereby contributing to the proper functioning of the Organization.

XI. In order to ensure that the statutory provisions concerning staff representation are not, either directly or indirectly, rendered ineffective, staff members who exercise responsibilities as representatives of their colleagues in the bodies where such representation is required must have the necessary time and facilities for that purpose. This concern is addressed by administrative instruction ST/AI/293, according to which: "The functions of staff representatives are official. Staff representatives shall have the same rights, duties, obligations and privileges as other staff members of the United Nations under the Staff Regulations and Rules and shall enjoy protection against any discriminatory treatment or prejudicial action based on their status or activities as staff representatives." The official nature of the functions of staff representatives implies that time spent in exercising these functions should not be regarded differently from the time spent on office duties, but as being on a par with the latter.

XII. Paragraph 9 of administrative instruction ST/AI/293 stipulates: "Staff representatives shall be entitled to attend established meetings of the Staff Council or corresponding staff representative body. Staff representatives shall also be granted reasonable official time to attend meetings of related bodies or to represent the staff in joint advisory bodies, including standing committees, working groups, etc. The proportion of official time spent by staff members on representational activities should not be unreasonable in relation to the carrying out of assigned duties." It is provided that the President or Chairman of the Executive Committee of each Staff Council in the locations where the United Nations has offices may be granted full-time release from

assigned duties if the number of staff members represented is 1,000 or more, or half-time release, if that number is less than 1,000. With regard to other members of the Executive Committee, it is stated (paragraph 11) that: "Other members of the Executive Committee should be afforded the necessary time required for them to carry out their functions promptly and efficiently. The details of such arrangements are to be determined in accordance with the procedures set out in chapter VIII of the Staff Rules." The concept of "reasonable time" calls for a definition which is not contained in the administrative texts. The Tribunal considers that the "reasonable time" that must be afforded to staff members discharging staff representational responsibilities is the time necessary and sufficient for the exercise of those responsibilities in accordance with the provisions of the Staff Regulations and Rules. It varies in each case, according to the scale of the representational tasks and their distribution over time.

XIII. Her candidacy for the reclassified post not having been accepted, the Applicant found herself without employment. It is not contested that, as the holder of a permanent appointment, the Applicant was entitled to benefit from the provisions of staff rule 109.1(c). That paragraph provides that staff members whose posts have been abolished should be given preference in being retained within the Organization, subject to the availability of suitable posts in which their services can be effectively used. The Tribunal has referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period

of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

The procedure followed in this regard in the Applicant's case was a complex one. Following the rejection of her candidacy for the post which she had been occupying until its reclassification, she was informed, on 22 November 1991, that, unless another post could be found for her, her permanent contract would be terminated on 31 May 1992, under administrative instruction CF/AI/1986-10 of 26 November 1986. This instruction refers, inter alia, to the situation of UNICEF staff members whose posts are abolished. However, the Secretary-General informed the Applicant on 21 May 1992, that, pursuant to the recommendation of the Joint Appeals Board (JAB), he had decided that no action should be taken to terminate her appointment, so as to allow UNICEF to give her the benefit of staff rule 109.1(c). Nevertheless, on 28 May 1992 (i.e. one week after the Secretary-General's communication), the Deputy Executive Director of UNICEF notified the Applicant that her appointment would be terminated on 31 August 1992, if placement efforts under staff rule 109.1(c) were unsuccessful.

The Applicant requested administrative review of this decision and subsequently lodged an appeal with the JAB. The JAB recommended that "all action to separate [the Applicant] from service be suspended" pending a decision on the substance of the appeal. The Secretary-General accepted this recommendation. The JAB, in its report dated 13 October 1992, on the merits of the case, recommended that "UNICEF extend the [Applicant]'s service for a final 3-month period from the date of the Secretary-General's decision on this report and expend every effort on a priority basis to resolve the issues with the [Applicant]." On 12 November 1992, the Applicant was informed that the Secretary-General accepted the JAB's recommendation. Then, on 19 November 1992, the Deputy Executive Director of UNICEF informed the Applicant that if by 11 February 1993 no suitable post had been found, she would be separated from service.

XIV. These various decisions gave rise to controversies between the parties, but the Tribunal does not deem it necessary to enter into them. The Tribunal merely has to address the question of whether staff rule 109.1(c) was correctly applied. In this regard, the Tribunal notes that the efforts of the Administration to find the Applicant alternative employment during the period of seven months, extended by a further three months following the decision of the Secretary-General pursuant to the recommendation of the JAB, should not be regarded as abnormal. As is the case with the failure of the Applicant's candidacy for the post which she wished to fill, the Tribunal does not have any formal evidence of discrimination against her in the process of applying staff rule 109.1(c). On the other hand, it appears that the failure of efforts to find alternative employment for the Applicant derived from the negative assessment of her performance in the absence of an arrangement regarding her obligations during the period July 1988-1990, as stated by the Tribunal in paragraph VIII above.

The Tribunal concludes that the Applicant's complaints regarding alleged discrimination against her because of her union and staff representational activities are not substantiated by conclusive evidence. On the other hand, the procedure applied to her, under staff rule 109.1(c), including her dismissal at the end of the period set by the decision of 19 November 1992, was vitiated by the failure to conclude, at the proper time, the arrangement provided for by administrative instruction ST/AI/293 and that, consequently, the rules laid down in chapter VIII of the Staff Rules and the procedures envisaged in that administrative instruction were not followed.

XV. Accordingly, the Tribunal:

1. Decides to rescind the decision taken by the Secretary-General that led to the termination of the Applicant's permanent

appointment, with effect from 11 February 1993 and that the Applicant should be reinstated as of that date.

2. Fixes the compensation to be paid to the Applicant at one year of her net base salary at the rate in effect on the date of her separation from service if the Secretary-General decides, within thirty days of the notification of the judgement, in the interest of the United Nations, not to reinstate the Applicant.

3. Decides that the Applicant should be paid the balance of the statutory termination indemnity to which she is entitled whenever the fixed-term appointment she may have with the United Nations expires. The Applicant's right to this termination indemnity shall cease if at that time or prior thereto she is reemployed as a permanent staff member.

XVI. The Applicant has requested the amount of 4,000 dollars for costs incurred in pursuing the appeal. The Tribunal, having considered the Applicant's request and in accordance with its finding in paragraph XXIX of Judgement No. 237, Powell (1979), decides to reject it.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 9 November 1994

R. Maria VICIEN MILBURN
Executive Secretary